89-923

No. 89-

Supreme Court, U.S.
FILED
DEC 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

WALTER BALL AND BARRY KABINOFF,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

GREGORY T. MAGARITY*
BURT M. RUBLIN

Attorneys for Petitioners

**Attorney of Record*

WOLF, BLOCK, SCHORR and
SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, PA 19102
(215) 977-2000

Of Counsel

The Winchell Company
1315 Cherry Street • Philadelphia, PA 19107
(215) 496-3664

Question Presented

Are a fire insurance claimant's Fifth Amendment rights violated where, after he has twice refused to answer the questions of the Police, they arrange for the attorney for his insurance company to act as their agent and compel the claimant, through the exercise of economic coercion, to submit to an examination under oath which is then used as the basis for the claimant's arrest for arson?

Parties to the Proceeding

Petitioners are Walter Ball and Barry Kabinoff. They were Appellees in the Pennsylvania Supreme Court. Respondent is the Commonwealth of Pennsylvania, which was the Appellant in the Pennsylvania Supreme Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Opinions Below

The decision of the Pennsylvania Supreme Court from which Petitioners seek review by this Court is not yet published. It is reproduced in the Appendix at A3a-A10a. The Pennsylvania Superior Court's opinion in this matter was not published, but is reproduced in the Appendix at A11a-A38a. The decision of the suppression court was published at 15 Phila. 190 (1987), and is set forth in the Appendix at A18a-A38a.

Jurisdiction

The judgment of the Pennsylvania Supreme Court was entered on October 6, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

Constitutional Provision Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

Statement of the Case

Petitioners Walter Ball and Barry Kabinoff are the owners of Austin Truck Rental, Inc., which formerly leased a garage building on Church Street in Philadelphia. A fire occurred in that building on the evening of March 16, 1982, causing damage to the building and its contents. On the evening of the fire, Lt. Thomas Schneiders, Assistant Fire Marshall, determined that the fire was of an incendiary nature, and several days later he classified it as an arson. (A19a).

On March 25, 1982, Lt. Schneiders and Police Detective James McKee briefly questioned Mr. Ball. He denied having any knowledge about the fire, and declined to

answer their questions. (R. 902a).[1] On June 7, 1982, Detective McKee again attempted to question Mr. Ball, and once again he refused to be questioned. (R. 903a). Thereafter, Detective Daniel Hogan of the Police Arson Squad was assigned to investigate the fire, and he testified that *he made no effort to question Mr. Bail because "I knew Mr. Ball didn't want to talk to anybody . . . I just assumed it would be a waste of time to go up and talk to him."* (R. 533a-534a).

After the fire, Austin Truck Rental submitted a claim to its fire insurance carrier, Hartford Accident and Indemnity Company ("Hartford"). The total amount of the claim was $91,332.35. (A5a). On June 15, 1982, the Hartford file relating to the Church Street fire was transmitted to Hartford's counsel, Michael Henry. (A6a). That file contained a copy of the Fire Marshall's report classifying the fire as an arson. (A20a). Mr. Henry, who had previously been a Philadelphia Assistant District Attorney for 7 years before entering private practice, promptly placed a telephone call to his former colleague, Larry Brown, who was Chief of the Economic Crimes Unit in the District Attorney's Office and liaison with the Fire Marshall's Office, "[t]o see if he knew anything about the fire." (A20a). After speaking with Asst. D.A. Brown, Mr. Henry spoke with Detective Hogan, and Mr. Henry arranged to meet with Detective Hogan the following day "to see what the extent of his [Hogan's] investigation was." (R. 103a).

Mr. Henry met with Detective Hogan on June 16, 1982 (just *one day* after having received Hartford's file relating to the fire) and told him that "I was interested in knowing what information they [the Police] had." (R. 118a). Detective Hogan allowed Mr. Henry to review the highly confidential and sensitive Police Investigation Reports relating to the Church Street fire which had been prepared thus far.

---

1. Citations with the prefix "R." are to the voluminous Record filed in the Pennsylvania Supreme Court.

(A6a). Mr. Henry learned from this review that: (a) Messrs. Ball and Kabinoff were under investigation by the Police and Fire Departments; (b) the Police were suspicious of the amount of inventory listed in the Proof of Loss submitted to Hartford; and (c) Mr. Ball had refused to be questioned by the Police. (A21a).

One week later, on June 23, 1982, Mr. Henry met with Lt. Schneiders and Capt. Charles LePre of the Fire Department. (A20a). During this meeting, Mr. Henry asked Lt. Schneiders and Capt. LePre a number of questions about their investigation into the cause and origin of the fire, and they confirmed to him that the fire was classified as an arson and that Messrs. Ball and Kabinoff were considered prime suspects in their investigation. (R. 136a-143a).

On June 24, 1982, only *one day* after his meeting with Lt. Schneiders and Capt. LePre, Mr. Henry sent a letter to Messrs. Ball and Kabinoff demanding that they submit to an examination under oath by him pursuant to the requirements of their insurance policy. (A6a). The suppression court found that Detective Hogan and Lt. Schneiders both knew of Mr. Henry's intention to demand that Messrs. Ball and Kabinoff submit to an examination under oath. (A22a-23a). Moreover, Mr. Henry conceded that he "may have" informed Detective Hogan and Lt. Schneiders of his intention to demand that Messrs. Ball and Kabinoff submit to an examination under oath by him. (A21a).

During the intervening period between his June 23, 1982 meeting with Lt. Schneiders and Capt. LePre and the July 21-22, 1982 examination under oath of Messrs. Ball and Kabinoff, Mr. Henry had numerous telephone conversations with Detective Hogan, Capt. LePre and Asst. D.A. Brown "to inquire as to the status of their investigation". (R. 198a, R. 207a).

On July 21 and 22, 1982, after having been fully apprised by the law enforcement authorities of all of the

information they had gleaned during their investigation, Mr. Henry conducted the examination under oath of Messrs. Ball and Kabinoff. Mr. Henry admonished them at the very outset of the examination that they were *obligated* under their insurance policy to answer *every single question* which he propounded to them:

> [I]f I ask you a question which you deem immaterial to your claims submission to Hartford and you do not want to respond to it *you should realize that that failure to respond may in and of itself be considered a material breach of the policy of insurance.* If you are uncomfortable with my questions or they intimidate you in any fashion and you don't answer my questions, I would just let you know that *it is your duty to appropriately respond whether or not your attorney directs you not to.* (A31a) (emphasis added).

The examination lasted for two days and the transcript of the examination is 375 pages long. At no time during the examination under oath did Mr. Henry inform Messrs. Ball and Kabinoff that he had previously met and shared information with investigators from the Police and Fire Departments, reviewed confidential Police Investigation Reports concerning the fire, and learned that Messrs. Ball and Kabinoff were considered prime suspects in the investigation by the Police and Fire Departments. (A31a)

After the examination under oath was transcribed, it was promptly provided by Mr. Henry to the District Attorney's Office, and thereafter certain statements made during the examination were relied upon in Detective Hogan's Affidavit of Probable Cause for the arrest of Messrs. Ball and Kabinoff. (A24a-25a; 29a). They were charged with arson, causing or risking a catastrophe, conspiracy and attempted theft.

Prior to trial, the defendants moved to suppress the Commonwealth's introduction into evidence of the transcript of the examination under oath on the grounds that it represented compelled testimony which was obtained by

the Commonwealth through a violation of their Fifth Amendment rights. (A25a, 38a-45a). The suppression court held an extensive evidentiary hearing on the motion to suppress and thereafter granted the motion, finding that (1) Mr. Henry had acted as an agent or instrument of the Commonwealth in conducting the examination under oath; and (2) Mr. Henry had violated the defendants' Fifth Amendment rights by compelling their testimony through the impermissible exercise of economic coercion. (A18a-37a). The Pennsylvania Superior Court unanimously affirmed the suppression court's order and adopted its opinion as its own. (A11a-17a). However, on October 6, 1989 the Pennsylvania Supreme Court reversed the decisions of the Superior Court and suppression court. (A3a-10a). The Supreme Court did *not* hold that the lower courts had erred in finding that Mr. Henry acted as an agent or instrument of the Commonwealth, but instead based its decision solely on its determination that the defendants had waived their Fifth Amendment rights by submitting to the examination under oath.

Reasons for Granting The Writ

The facts adduced during the suppression hearing clearly support the finding of the suppression court and Superior Court that Mr. Henry acted as "an agent of the Commonwealth of Pennsylvania during the course of his investigation and subsequent examination under oath of the defendants". (A26a). Mr. Henry met and conversed on numerous occasions with the law enforcement authorities who investigated the Church Street fire, and they exchanged all of their information with one another and worked hand-in-glove in furtherance of their shared objective of implicating Messrs. Ball and Kabinoff in connection with that fire.

The "symbiotic" relationship between the Commonwealth and Mr. Henry (A26a), which was cloaked under

the protective mantle of the Arson Reporting Immunity Act,[2] redounded to their mutual benefit. It enabled the Commonwealth to accomplish indirectly what it had previously tried, without success, to do directly — to wit, interrogate Messrs. Ball and Kabinoff concerning the fire. As the suppression court correctly found, "the investigations of the Philadelphia Police and Fire Departments were stymied and the examination under oath, unbeknownst to the defendants, was the Commonwealth's only avenue to proceed forward and ultimately effectuate the defendants' arrest". (A28a). The close cooperation between the Commonwealth and Mr. Henry also greatly benefited his client, Hartford, because the Commonwealth's initiation of criminal proceedings against the defendants enabled Hartford to forestall payment of the fire insurance claim which they submitted. Thus, Mr. Henry was amply motivated to assist the Commonwealth's investigation, because its prosecution of the defendants would benefit his client.

This Court has repeatedly held that the acts of private individuals may, under certain circumstances, be deemed "governmental" actions and may therefore amount to violations of a defendant's constitutional rights. The fundamental principle enunciated in these cases is that the government may not circumvent constitutional limitations upon its conduct by utilizing a private individual to perform a forbidden act on its behalf. As this Court has stated, the "critical factor" in such cases is determining whether or not the private individual "in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state . . ." *Coolidge v. New Hampshire,* 403 U.S. 443, 487 (1971). *Accord Skinner v. Railway Labor Executives Ass'n,* ____ U.S. ____ 109 S.Ct.

---

2. The Act confers immunity from criminal prosecution and civil liability upon an insurance company and its representatives who furnish information to investigative agencies pursuant to requests under the Act, "unless there be actual malice". 40 Pa.S.A. §1610.4.

1402, 1411-12 (1989); *United States v. Jacobsen,* 466 U.S. 109, 113-14 (1984); *Burdeau v. McDowell,* 256 U.S. 465, 475 (1921).

Just last Term, this Court declared that where there are "clear indices of the Government's encouragement, endorsement, and participation" in an otherwise private search, the search may be imputed to the Government and may implicate the rights protected under the Fourth Amendment. *Skinner, supra,* 109 S.Ct. at 1412. Indeed, this Court made it clear in *Skinner* that "[t]he fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one". *Id.* at 1411.

In the instant case, as in *Skinner,* "the Government did more than adopt a passive position toward the underlying private conduct". *Id.* at 1411. A review of the facts set forth above and at greater length in the suppression court's opinion clearly supports that court's determination that Mr. Henry had a "symbiotic" relationship with the Commonwealth and acted as its agent in conducting the examination under oath. It bears reiteration here that this determination was *not* reversed by the Pennsylvania Supreme Court.

Detective Hogan and Lt. Schneiders both knew that Mr. Henry would be taking an examination under oath of the defendants, and they also knew that it was in the Commonwealth's best interest that Mr. Henry be fully informed as to what the Police and Fire Department investigators had learned prior to taking the examination. Indeed, in explaining why he showed the highly confidential Police Investigation Reports to Mr. Henry during their June 16, 1982 meeting, Detective Hogan acknowledged:

> If they're [Hartford] going to investigate and we're going to investigate, if we're leading to the same direction, if we can assist each other, that's part of the reason. (R. 457a-458a).

Detective Hogan realized that Messrs. Ball and Kabinoff would refuse to talk to him, and he knew that he could do an "end run" through his surrogate, Mr. Henry, who could and would exercise Hartford's considerable economic leverage to compel them to submit to an examination under oath. As the suppression court observed, "[t]hrough economic coercion and compulsion of the defendants to submit to an examination under oath, [Mr. Henry] was able to achieve what the Commonwealth could not — testimony of the defendants under oath and an employee list of Austin Truck Rental, Inc." (A30a).

In addition to finding that Mr. Henry acted as an "instrument" or "agent" of the Commonwealth, the suppression court also found that he "exerted extreme economic leverage and compulsion over the defendants to the benefit of his client and the Commonwealth." (A28a). The suppression court therefore properly concluded that "the examination under oath is clearly *compelled* testimony which is violative of the [defendants'] Fifth Amendment rights and must be suppressed along with the fruits thereof." (A30a-31a) (emphasis in original).

In reversing the suppression order, the Pennsylvania Supreme Court reasoned that since the defendants testified at the examination under oath, they waived their Fifth Amendment rights. This decision ignores the fact that the defendants had *twice* previously *refused* to be questioned by the Police, and they submitted to extensive interrogation by Mr. Henry only *after* being threatened by him that a failure to appear and answer every single question he propounded would entitle Hartford to deny their insurance claim.

The Fifth Amendment not only guarantees the right to remain silent absent immunity, it also prohibits the use of a witness' compelled statements against him. Thus, a Fifth Amendment inquiry is *not* ended when a statement is made in lieu of a claim of privilege — the Court must

determine whether the witness' failure to claim the privilege was attributable to coercion or was the result of a voluntary, freely-made decision. As this Court stated in *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977), "when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution."

Mr. Henry presented Messrs. Ball and Kabinoff with a "Hobson's choice" — either submit to an examination under oath by him and answer every one of his questions, or forfeit their right to collect their $91,332.35 insurance claim. Indeed, at the very outset of the examination, Mr. Henry admonished Messrs. Ball and Kabinoff that they were obligated to answer *all* of his questions, even "[i]f you are *uncomfortable* with my questions or they *intimidate* you in any fashion," and even if they deemed the questions to be "immaterial" to their insurance claim. (A31a). (emphasis added). He further stated that "it is your duty to appropriately respond *whether or not your attorney directs you not to.*" (A31a) (emphasis added). The attorney for Messrs. Ball and Kabinoff aptly described his clients' predicament:

> I saw my clients on the horns of a dilemma . . . the insurance company was taking the position that unless you tell us what we want to know we are not going to pay . . . (A33a).

This Court has repeatedly held that if the State seeks to induce a person to testify by threatening to impose economic sanctions upon him if he refuses to respond, and thereafter he testifies without invoking his Fifth Amendment privilege, his responses will be deemed "compelled" and will be inadmissible as evidence against him in a subsequent criminal prosecution. *See, e.g., Garrity v. New Jersey,* 385 U.S. 493 (1967); *Spevack v. Klein,* 385 U.S. 511 (1967); *Gardner v. Broderick,* 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sani-*

tation, 392 U.S. 280 (1968); *Lefkowitz v. Turley,* 414 U.S. 70 (1973); *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977).

In *Garrity v. New Jersey, supra,* police officers under investigation were asked potentially incriminating questions following warnings to them that if they did not answer they would be removed from their jobs. The officers decided to answer the questions and their answers were later used over their objections in their prosecutions for conspiracy. This Court held that, in the context of threats of economic sanction, the act of responding to interrogation was *not* voluntary and was *not* an effective waiver of the Fifth Amendment privilege. 385 U.S. at 497-500. As this Court later declared in *Lefkowitz v. Turley, supra,* 414 U.S. at 72-3, "[a] waiver secured under threat of substantial economic sanction cannot be termed voluntary."[3]

Here, too, it cannot be contended that defendants voluntarily "waived" their Fifth Amendment rights by answering Mr. Henry's questions at the examination under oath, because that purported "waiver" was the direct result of economic coercion. The defendants' "Hobson's choice" of either submitting to Mr. Henry's examination under oath or suffering the denial of their insurance claim effectively deprived them of their "free choice to admit, to deny, or to refuse to answer." *Garrity v. New Jersey, supra,* 385 U.S. at 496. As this Court stated in *Garrity,* "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." *Id.* at 498.

As set forth above, it is constitutionally irrelevant that the econmic coercion was applied here by Mr. Henry rather than by a law enforcement agency or officer, because Mr.

---

3. Similarly, in *Minnesota v. Murphy,* 465 U.S. 420, 435 and n. 7 (1984), the Court stated that the general rule that a person must assert the Fifth Amendment privilege or be deemed to have waived it is inapplicable in "the classic penalty situation [which excuses] the failure to assert the privilege."

Henry acted as an agent of the Commonwealth when he demanded that defendants submit to an examination under oath. In language equally applicable to the case at bar, the Court in *United States ex. rel. Sanney v. Montanye,* 500 F.2d 411, 415 (2d Cir. 1974), *cert. denied,* 419 U.S. 1027 (1974), stated as follows:

> Nor do we perceive any consequence flowing from the fact that the threat in the present case was conveyed through a private employer, admittedly acting as an agent for the police, rather than through a person on the public payroll. *The state's involvement is no less real for having been indirect and no less impermissible for having been concealed. The state is prohibited in either event from compelling a statement through economically coercive means, whether they are direct or indirect.* (emphasis added).

In this case, the suppression court did not have to speculate or engage in conjecture as to whether the defendants would have been willing to submit to interrogation absent the threat that their insurance claim would be denied if they failed to appear and respond to all questions. Prior to Mr. Henry's demand that Messrs. Ball and Kabinoff submit to an examination under oath, Detective McKee had twice attempted to question Mr. Ball and had been told by him on both occasions that he would not answer any questions. Thereafter, Detective Hogan didn't even bother to attempt such an interview, because "I knew Mr. Ball didn't want to talk to *anybody* . . . I just assumed it would be a waste of time to go up and talk to him." (R. 533a-534a) (emphasis added).

However, once Mr. Henry entered the picture, things changed dramatically, because he had at his disposal a potent weapon which was unavailable to the Police and Fire Departments — substantial economic leverage over Messrs. Ball and Kabinoff. Mr. Henry successfully exercised that powerful leverage for the benefit of both Hartford and the Commonwealth, coercing defendants into submitting to a protracted two-day examination which comprises

375 pages of transcript. In light of all of these facts and circumstances, there is ample factual and legal support for the suppression court's finding that "the testimony of the defendants was compelled in every sense of the word." (A33a).

CONCLUSION

The Pennsylvania Supreme Court's decision in this case is fundamentally at odds with this Court's teaching in *Lefkowitz v. Turley, supra,* that "a waiver secured under threat of substantial economic sanction cannot be termed voluntary." 414 U.S. at 72-73. Accordingly, Petitioners respectfully submit that certiorari should be granted by this Court.

Dated: December 6, 1989

Respectfully submitted,

GREGORY T. MAGARITY*
BURT M. RUBLIN

Attorneys for Petitioners

**Attorney of Record*

Of Counsel:

WOLF, BLOCK, SCHORR and SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, PA 19102
(215) 977-2000